

EXHIBIT B

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

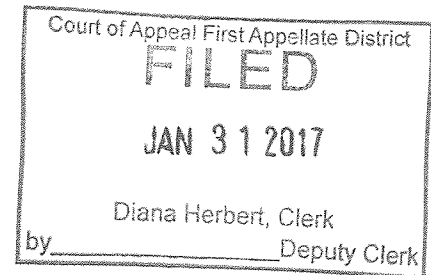
FIRST APPELLATE DISTRICT

DIVISION FIVE

In re WARREN HAVENS on Habeas Corpus.

A150411

Alameda No. 2002070640



BY THE COURT:*

The court regards with extreme displeasure petitioner's belated filing of this writ petition on the eve of the requested stay, particularly given that the challenged order was issued on December 14, 2016, and that order states petitioner's counsel "indicated a contemplation of seeking appellate review" of the order. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2016) ¶ 15:146.1, p. 15-92 ["Courts are not inclined to look favorably upon petitions alleging the need for a stay and immediate relief if the petition is filed on the day before ... trial but the challenged order was rendered weeks ... previously. If a proceeding sought to be stayed is imminent, the petition should always set forth adequate justification for any filing delay."].) Nevertheless, to avoid duplicative and even more urgent proceedings, the court will retain this petition for consideration.

Pending further consideration of the petition for writ of habeas corpus/prohibition/certiorari on file herein, this court TEMPORARILY STAYS, until further order of this court, the December 14, 2016 "Order Holding Warren Havens in

* Before Simons, Acting P.J., Needham, J., and Bruiniers, J.

Contempt for Failure to Comply with Court Orders,” in *Leong v. Havens et al.*, Alameda County Superior Court case No. 2002070640.

Even though petitioner has sought alternative forms of writ relief other than habeas corpus, the petition does not designate a real party in interest. Therefore, on or before 3:00 p.m. on February 1, 2017, petitioner shall serve and file a document designating appropriate real parties in interest, and ensure service of that document, the petition, exhibits, all other filings, and this order, on those parties.

Any opposition to the petition shall be served and filed within twenty (20) days of the filing of this order, and any reply shall be served and filed within twenty (20) days thereafter.

In addition to regular service of this order, the Clerk of Division Five shall forthwith notify the parties by telephone of the contents of this order.

Date JAN 31 2017

Simons, J. P.J.

Acting P.J.

Civil Appeal No.:

**COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION _____**

Warren Havens,

Petitioner,

v.

The Superior Court of the State of
California, County of Alameda,

Respondent.

Case No.: 2002-070640

Honorable Robert Freedman
Judge Presiding
Dept.: 20

**PETITIONER WARREN HAVENS' PETITION FOR WRIT OF HABEAS CORPUS
OR, IN THE ALTERNATIVE, CERTIORARI OR
PROHIBITION AND FOR OTHER APPROPRIATE RELIEF; MEMORANDUM OF
POINTS AND AUTHORITIES; AND REQUEST FOR IMMEDIATE STAY OF
PROCEEDINGS PENDING INTERLOCUTORY REVIEW**

[EXHIBITS FILED UNDER SEPARATE COVER]

**REQUEST FOR IMMEDIATE STAY OF ORDER OF CONTEMPT OF COURT
TO GO INTO EFFECT BEFORE FEBRUARY 1, 2017,
HON. ROBERT FREEDMAN,
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ALAMEDA
(510) 267-6936**

Eileen R. Ridley
Alan R. Ouellette
FOLEY & LARDNER LLP
555 California Street, Suite 1700
San Francisco, CA 94104
Telephone: (415) 434-4484
Facsimile: (415) 434-4507

David B. Goroff (*pro hac vice pending*)
FOLEY & LARDNER LLP
321 N. Clark Street, Suite 2800
Chicago, IL 60654
Telephone: (312) 832-4500
Facsimile: (312) 832-4700

Attorneys for Petitioner Warren Havens

Received by First District Court of Appeal

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The following entities or persons have either: (1) an ownership interest of 10 percent or more in the party filing this certification (Cal. Ct. R. 8.208(e)(1)); or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves (Cal. Ct. R. 8.208(e)(2)):

1. Petitioner Warren Havens is the subject of the Contempt Order at issue;
2. Susan L. Uecker is the Receiver for Havens' companies who requested the Contempt Order at issue;
3. Dr. Arnold Leong is an individual and the plaintiff in the action;
4. Environmental LLC is named as a defendant in the action and is a corporation majority-owned by Petitioner;
5. Environmental-2 LLC is named as a defendant in the action and is a corporation majority-owned by Petitioner;
6. Intelligent Transportation & Monitoring Wireless LLC is named as a defendant in the action and is a corporation majority-owned by Petitioner;
7. V2G LLC is named as a defendant in the action and is a corporation majority-owned by Petitioner;
8. Atlis Wireless LLC is named as a defendant in the action and is a corporation majority-owned by Petitioner;
9. Skybridge Spectrum Foundation is named as a defendant in the action and is a corporation majority-owned by Petitioner;
10. Verde Systems LLC is named as a defendant in the action and is a corporation majority-owned by Petitioner; and

11. Telesaurus Holdings GB, LLC is named as a defendant in the action and is a corporation majority-owned by Petitioner.

There are no other interested entities or persons to list in this certification (Cal. Ct. R. 8.208(e)(3)).

Dated: January 31, 2017

Respectfully submitted,

/S/ EILEEN R. RIDLEY
Eileen R. Ridley
Attorneys for Petitioner Warren Havens

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	10
II. BACKGROUND	12
A. Havens Controlled And Managed Eight Entities Which Own Valuable FCC Licenses	12
B. Leong Is A Minority Investor In Only Two Of Havens’ Eight Entities	14
C. A Receiver Is Appointed, Who Seizes Control Over All Of The Havens’ Companies’ Licenses	15
D. The Superior Court Orders Havens And Leong To Keep Arbitrating And Allows Havens To Advocate For The Receivership Entities Therein	16
E. The Superior Court Acknowledges The Risk Of A Prior Restraint And Tries To Modify Its Order	17
F. The July 2016 Order Continues To Impose A Prior Restraint On Havens’ Communication With The FCC	17
G. The Receiver Jeopardizes The Value And Existence Of The Havens Companies’ Licenses	18
H. Havens Initiates A Bankruptcy Against A Non-Receivership Entity	19
I. The Receiver, <i>Ex Parte</i> , Moves For An Order Of Contempt	20
J. Havens Communicates With The FCC	21
K. The Receiver Seeks An Additional Contempt Finding Based On The FCC Communication	22
L. The Superior Court Holds Havens In Contempt And Threatens Imprisonment	22
1. The Superior Court Finds Havens In Contempt For Filing The Bankruptcy Against the Leong Partnership	24
2. The Superior Court Finds Havens In Contempt For Communicating With The FCC	25
3. The Superior Court Sentences Havens To Jail And Fines Him	26

M.	Havens Dismisses The Leong Partnership Bankruptcy, But The Bankruptcy Court Thereafter Grants Dismissal On Summary Judgment.....	27
N.	The Superior Court Acknowledges That It “Is Not A Great Thing” That The Receiver Runs Havens’ Businesses.....	27
O.	The Superior Court Permits Havens To Make A Limited Communication To The FCC, But Does Not Address The Contempt Order.....	29
P.	The Superior Court Rejected Havens’ Request For A Stay Pending Determination Of The Writ.....	29
MEMORANDUM OF POINTS AND AUTHORITIES		33
I.	ARGUMENT	33
A.	A Writ Is Proper Here	33
B.	By Restricting Whether And How Havens Could Communicate With The FCC, The Receivership Order And July 2016 Order Are Invalid Prior Restraints Which Violate The First Amendment And California Constitution.....	35
1.	The Receivership Order And July 2016 Order Are Unlawful Prior Restraints.....	35
2.	The Underlying Orders Are Unconstitutionally Vague	37
3.	The Underlying Orders Violate The First Amendment And California Constitution By Having Free Speech Rights Turn On The Listener’s Perception	39
C.	The Contempt Order Is Invalid Because The Receivership Order And July 2016 Order Violate Havens’ Right Under The First Amendment And California Constitution To Petition The FCC For Redress Of Grievances	40
D.	The Receivership Order Violates The Supremacy Clause Insofar As It Restricted Havens’ Filing Of A Bankruptcy For A Non-Receivership Entity.....	41
E.	The Contempt Order Is Void Because Havens Did Not Willfully Violate The Receivership Order Or The July 2016 Order.....	43
F.	The Contempt Order Is Void Because The Receiver Did Not Prove Havens’ Violations Of The Underlying Orders Beyond A Reasonable Doubt.....	44
G.	This Court Should Enter A Stay Pending Disposition Of The Petition.....	45

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Berndt v. California Dept. of Corrections</i> (N.D. Cal., Aug. 9, 2004, No. C03-3174 TEH) 2004 WL 1774227	35
<i>In re Berry</i> 68 Cal.2d 137 (1968) [65 Cal.Rptr. 273 P.2d 273]	37
<i>In re Blaze</i> (1969) 271 Cal.App.2d 210 [76 Cal.Rptr. 551]	37
<i>In re Buckley</i> (1973) 10 Cal.3d 237 [110 Cal.Rptr. 121 P.2d 1201]	33
<i>California Motor Transport Co. v. Trucking Unlimited</i> (1972) 404 U.S. 508	40
<i>Coates v. City of Cincinnati</i> (1971) 402 U.S. 611	37
<i>In re Corporate and Leisure</i> (Bankr. D. Ariz. 2006) 351 B.R. 724	42
<i>CPF Agency Corp. v. Sevel's 24 Hour Towing Service</i> (2005) 132 Cal.App.4th 1034 [34 Cal. Rptr. 3d 120]	32
<i>Davidson v. Superior Court</i> 70 Cal.App.4th 514 (1999) [82 Cal.Rptr.2d 739]	33
<i>Donovan v. City of Dallas</i> (1964), 377 U.S. 408	3, 8, 41
<i>Evans v. Evans</i> (2008) 162 Cal.App.4th 1157 [76 Cal. Rptr. 3d 859]	32
<i>Fine v. Superior Court (DeFlores)</i> (2002) 97 Cal.App.4th 651 [119 Cal. Rptr. 2d 376]	33
<i>Forsyth County v. Nationalist Movement</i> , 505 U.S. 123	39
<i>Matter of Greater Atlanta Apartment Hunter's Guide, Inc.</i> (Bankr. N.D. Ga. 1984) 40 B.R. 29	42

<i>Hurvitz v. Hoefflin</i> (2000) 84 Cal.App.4th 1232 [101 Cal. Rptr. 2d 558]	32
<i>International Shoe Co. v. Pinkus</i> 278 U.S. 261 (1929).....	42
<i>Jordan v. Independent Energy Corp.</i> 446 F.Supp. 516 (N.D. Tex. 1978)	42
<i>In re Koehler</i> (2010) 181 Cal.App.4th 1153 [104 Cal.Rptr.3d 877]	33
<i>In re Kreislers, Inc.</i> (Bankr. D.S.D. 1990) 112 B.R. 996.....	42
<i>Lopez v. Tulare Joint Union High School Dist.</i> (1995) 34 Cal.App.4th 1302 [40 Cal.Rptr.2d 762], as modified (June 6, 1995)	34
<i>In re M.R.</i> (2013) 220 Cal.App.4th 49 [162 Cal. Rptr. 3d 709]	32
<i>In re Marcus</i> (2006) 138 Cal.App.4th 1009 [41 Cal.Rptr.3d 861]	37
<i>Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Intern. Union</i> (2d Cir. 2001) 239 F.3d 172.....	35, 39
<i>Miller v. Municipal Court of Los Angeles Judicial Dist., Los Angeles County</i> (1967) 249 Cal.App.2d 531 [57 Cal.Rptr. 578]	33
<i>Miller v. Superior Court</i> (1999) 21 Cal.4th 883 [89 Cal.Rptr.2d 834 P.2d 170].....	35
<i>Mitchell v. Superior Court</i> (1989) 49 Cal.3d 1230 [265 Cal. Rptr. 144]	32
<i>Moore v. Kaufman</i> (2010) 189 Cal.App.4th 604 [117 Cal.Rptr.3d 196]	34
<i>Nebraska Press Ass'n v. Stewart</i> (1976), 427 U.S. 539	2, 35, 36
<i>New York Times Co. v. Superior Court</i> (1990) 51 Cal.3d 453 [273 Cal.Rptr. 98 P.2d 811]	4, 5, 45
<i>Oksner v. Superior Court In and For Los Angeles County</i> (1964) 229 Cal.App.2d 672 [40 Cal.Rptr. 621]	34

<i>Organization for a Better Austin v. Keefe</i> (1971) 402 U.S. 415	35
<i>Radio Station WOW v. Johnson</i> (1945) 326 U.S. 120	41
<i>S.E.C. v. Byers</i> (2d Cir. 2010) 609 F.3d 87	42
<i>San Diego Unified Port Dist. v. U.S. Citizens Patrol</i> (1998) 63 Cal.App.4th 964 [74 Cal.Rptr.2d 364]	34, 39
<i>In re Skybridge Spectrum Foundation</i> , No. 16-10626 (CSS)	13, 20
<i>Smith v. Silvey</i> (1983) 149 Cal.App.3d 400 [197 Cal.Rptr. 15]	40
<i>Taylor v. Dep’t of Industrial Relations, Division of Labor Standards Enforcement</i> (2016) 4 Cal.App.5th 801 [41 Cal. Rptr. 3d 861]	32
<i>Thompson v. Samson United Corp.</i> 203 Misc. 48 [113 N.Y.S.2d 607] (N.Y. Sup. Ct. 1952)	42
<i>Walker v. City of Birmingham</i> (1967) 388 U.S. 307	35
<i>Wilson v. Superior Court</i> (1987) 194 Cal.App.3d 1259 [240 Cal.Rptr. 131]	37
Statutes	
California Code of Civil Procedure	
§ 1209	6, 12, 32, 33, 44
§ 1218	26
Freedom of Information Act	36
Other Authorities	
Cal. Const., art. I	
§ 2	<i>passim</i>
§ 3	8, 40
California Constitution	<i>passim</i>
U.S. Const. amend. I	<i>passim</i>
U.S. Const. amend. V	22

U.S. Const. amend. XIV	38
U.S. Const., Supremacy Clause, art. VI, cl. 2	<i>passim</i>

Civil Appeal No.:

**COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION _____**

Warren Havens,

Petitioner,

v.

The Superior Court of the State of
California, County of Alameda,

Respondent.

Case No.: 2002-070640

Honorable Robert Freedman
Judge Presiding
Dept.: 20

**PETITIONER WARREN HAVENS' PETITION FOR WRIT OF HABEAS CORPUS
OR, IN THE ALTERNATIVE, CERTIORARI OR
PROHIBITION AND FOR OTHER APPROPRIATE RELIEF; MEMORANDUM OF
POINTS AND AUTHORITIES; AND REQUEST FOR IMMEDIATE STAY OF
PROCEEDINGS PENDING INTERLOCUTORY REVIEW**

[EXHIBITS FILED UNDER SEPARATE COVER]

**REQUEST FOR IMMEDIATE STAY OF ORDER OF CONTEMPT OF COURT
TO GO INTO EFFECT BEFORE FEBRUARY 1, 2017,
HON. ROBERT FREEDMAN,
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ALAMEDA
(510) 267-6936**

QUESTIONS PRESENTED

1. Whether an immediate stay should issue of the contempt order issued against Petitioner Warren Havens (“Havens”) on December 14, 2016 by the Superior Court of Alameda County which sentences Havens to ten days imprisonment and imposes substantial monetary penalties (the “Contempt Order”), where Havens has more than a colorable argument against the contempt adjudication, in that the Contempt Order is void because it is based upon orders which are unconstitutional under the United States and California Constitutions.

2. Whether the Contempt Order is void because it was based on two orders – an order imposing a receivership upon eight entities which Havens founded, controlled and majority-owned dated November 16, 2015 (the “Receivership Order”) and a modification of that Order dated July 11, 2016 (the “July 2016 Order”) (together the “Underlying Orders”) which forbade Havens from communicating with the Federal Communications Commission (“FCC”), the regulator of licenses (“Licenses”) held by these entities and therefore imposed an unlawful prior restraint on free speech prohibited by the First Amendment to the United States Constitution and the California Constitution, art. I, § 2.

3. Whether the Contempt Order is void because, by restricting Havens from communicating with his and his entities’ Regulator, it infringed his right to petition the government for the redress of grievances in violation of the First Amendment to the United States Constitution and the California Constitution.

4. Whether the Receivership Order, insofar as it prevented Havens from filing a federal bankruptcy against a non-Receivership Entity, violated the Supremacy Clause of the United States Constitution, art. VI, cl. 2.

5. Whether the Contempt Order is void because the Receiver did not meet her burden of proof of showing beyond a reasonable doubt that Havens willfully violated the Underlying Orders.

6. Whether the Contempt Order is void because the Receiver did not meet her burden of proof of showing beyond a reasonable doubt that Havens actually violated the Underlying Orders either by filing the bankruptcy or by communicating with the FCC.

BRIEF ANSWERS

1. Yes. A stay should issue because Havens has more than a colorable argument against the contempt adjudication. He is likely to succeed on the merits of the petition because the Contempt Order is void as it is based on Underlying Orders which are unconstitutional. Because he faces unjust imprisonment in light of this void order, he faces irreparable injury for which there is no adequate remedy at law. The public interest requires that individuals not lose their personal liberty based upon orders that are void and unenforceable.

2. Yes. The Contempt Order is void because it is based upon an alleged violation of an injunction in the Underlying Orders which prohibit Havens from communicating with the FCC. This is an unlawful prior restraint, which the United States Supreme Court has held is “the most serious and least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stewart* (1976), 427 U.S. 539, 559. The California Constitution also prohibits unlawful prior restraints. Cal. Const. art I, § 2. The plain language of the July 2016 Order expands the injunction, restricting Havens from communicating not just with the FCC but with “any other person or entity” in a way any person might construe as being on behalf of the Receivership Entities. The Underlying Orders also are unconstitutionally vague in that they provide no standard to gauge how listeners *might* perceive Havens’ speech. Finally, the Underlying Orders

violate Havens' right to free speech because that right may not turn on how listeners might perceive that speech.

3. Yes. Havens had a fundamental right to petition the FCC for a redress of his legitimate grievances. He believes that unique and extraordinarily valuable Licenses held by his Entities are being mishandled by the Receiver in a way that not only undermines his rights and those of his Entities, but also the public's interest.

4. Yes. The Contempt Order is void because it is based on a finding that Havens acted in contempt by initiating a bankruptcy against a non-Receivership Entity. This interferes with Havens' federally-protected right to file bankruptcy and therefore violates the Supremacy Clause. The United States Supreme Court has held that a state may not hold persons in contempt for exercising their rights in federal court. *See Donovan v. City of Dallas* (1964), 377 U.S. 408.

5. Yes. Havens did not act willfully. With regard to his communication with the FCC, he believed that the July 2016 Order permitted him to make that communication so long as he did not claim to act for the Receiver or the Receivership Entities. He expressly told the FCC he was not acting for the Receiver or the Receivership Entities, yet the Superior Court found him in contempt anyway. The Receiver's counsel even admitted below that Havens could have interpreted the July 2016 Order to modify the original blanket prohibition on communicating with the FCC. That acknowledgement alone precludes a finding of willfulness beyond a reasonable doubt.

With regard to his bankruptcy filing, the Receivership Order expressly anticipates that Havens might initiate a bankruptcy. It also notes that such a bankruptcy might affect the Receivership estate. And it sets forth the Receiver's rights and responsibilities if such a

bankruptcy is filed. Havens testified he believed that this language permitted him to file the bankruptcy. The Receiver produced no evidence to dispute this testimony.

6. Yes. The Receiver did not meet her burden of proving beyond a reasonable doubt that Havens actually violated either the Receivership Order or the July 2016 Order. A fair reading of the express terms of the Receivership Order is that it permitted Havens to file the Leong Bankruptcy. Moreover, a fair reading of the July 2016 Order is that it modified the Receivership Order to permit Havens to communicate with the FCC so long as he did not do so in a manner which suggested he was speaking for the Receiver or Receivership Entities. The Receiver submitted no evidence that the FCC believed that Havens was speaking on behalf of the Receiver or the Receivership Entities.

WHY EXTRAORDINARY WRIT RELIEF IS WARRANTED

Havens is now threatened with imprisonment, having been found in contempt of court by the Superior Court. The Contempt Order reaches this result for two reasons. First, it finds that Havens violated the Receivership Order, which imposed a receivership on eight entities which Havens founded, controlled and majority owns and which hold valuable wireless spectrum-based licenses issued by the FCC, when he filed a federal bankruptcy as to a non-receivership entity – the Leong Partnership. Second, it found that Havens violated the Underlying Orders by communicating with the FCC (the “FCC Communication”), in violation of an injunction in these Orders forbidding such communications. Because the Contempt Order is void, a writ of habeas corpus or other appropriate writ or relief should issue.

A. IT IS URGENT THAT HAVENS RECEIVE AN IMMEDIATE STAY.

To begin with, because Havens’ personal liberty is immediately and grievously threatened by a ten-day prison sentence for contempt, an immediate stay should issue. In *New*

York Times Co. v. Superior Court (1990) 51 Cal.3d 453 [273 Cal.Rptr. 98, 796 P.2d 811], the California Supreme Court held that:

To avoid confinement under a judgment of contempt that may subsequently be set aside, a trial court should stay its judgment of contempt to allow the contemner newsperson sufficient time in which to seek writ relief if the trial court believes there is any colorable argument the newsperson can make against the contempt adjudication. If the trial court nevertheless declines to issue a stay, a reviewing court should do so pending its decision whether to issue an extraordinary writ.

New York Times Co., *supra*, 51 Cal.3d at p. 460, 273. Cal. Rptr. at 102.

Havens plainly has a “colorable argument” against the contempt adjudication. Indeed he has a compelling argument that the Contempt Order is unconstitutional under the United States and California Constitutions and is otherwise invalid. He should not now have to face prison while the merits of his Petition are decided.

Havens presented an *ex parte* motion for a stay to the Superior Court on January 30, 2017. Havens advised the Court that he believed he was likely to succeed because of the constitutional violations at issue and his lack of willfulness; that because of the threat of imprisonment he faced irreparable injury for which there was no adequate remedy at law; that the Receiver would suffer no prejudice from a stay; and that the public interest favored a stay. Nonetheless, the Superior Court denied a stay.

The Superior Court had issued a stay through February 1, 2017 so Havens could file this writ, but it refused to issue an extension of that stay so that this Court had an opportunity to *decide* that petition without Havens going to jail. Judge Robert Freedman of the Superior Court stated that, had Havens paid the fines in December upon entry of the Contempt Order, he would have considered a stay. But since he had not, he would not. However, Judge Freedman stated that it would respect a stay issued by the Court of Appeal. The Court stated that Havens was to

show up to further proceedings on Wednesday, February 1, 2017 at 9:30 a.m. and that if this Court does not stay the incarceration portion of the Contempt Order, and should Havens not appear, it would issue a bench warrant for his arrest. Now that Havens has exhausted the possibility of obtaining a stay from the lower court, this Court should issue a stay so that it may orderly decide this petition.

B. A VOID ORDER CANNOT BE THE BASIS FOR A VALID CONTEMPT JUDGMENT.

The Superior Court found authority for its Contempt Order in § 1209(a)(5). This provides that one may be found in Contempt of Court where there is: “(5) Disobedience of any *lawful* judgment, order or process of the Court.” (*Id.*) (emphasis added).

As the Superior Court recognized, this requires a movant to prove each of four elements: (1) there is a valid order, (2) a party has actual knowledge of the order; (3) the party has the ability to comply with the order; and (4) the party has willfully disobeyed the order. The movant bears the burden and must provide each element beyond a reasonable doubt. Here, the Receiver did not and could not meet her burden because the Underlying Orders are invalid.

1. The Underlying Orders Violate The First Amendment And California Constitution.

First, by restricting whether and how Havens could communicate with the FCC, the Underlying Orders impose invalid prior restraints which violate the First Amendment and California Constitution.

Prior restraints on free speech under the First Amendment are subject to the highest level of scrutiny. When, as here, a prior restraint takes the form of a court-issued injunction, the risk of infringing on speech protected under the First Amendment increases. Here, the Underlying Orders plainly imposed an unlawful prior restraint on Havens. The Superior Court made clear it had issued an injunction against Havens speaking. It reiterated that this injunction was not

modified by the July 2016 Order and that under no circumstance was Havens to communicate directly with the FCC.

Moreover, while the July 2016 Order provided that Havens could ask the Receiver to make certain representations to the FCC (which she could reject), the Superior Court held that that Order continued to fully prohibit Havens from speaking to the FCC himself. The July 2016 Order stated that Havens is “is not to communicate with the [FCC] or to any other person or entity in a manner that might lead to the recipient of the communication to infer that the communication from Mr. Havens may be on behalf of any Receivership Entity.” The plain language of the Order restricted Havens from communicating not just with the FCC but with “any other person or entity in a way any person *might* construe as being on behalf of the Receivership Entities.” No standards were set forth as to how Mr. Havens was supposed to make that determination. There certainly was no “clear and present danger” which justified this prior restraint – and the Court found none. Indeed, this restriction could only chill and restrict protected free speech.

Second, the Underlying Orders are unconstitutionally vague. In order to establish a case for contempt, the underlying order must be clear, specific and unequivocal and any ambiguity must be resolved in the contemnor’s favor. The Underlying Orders fail this test. The language of the July 2016 Order said that Havens could not communicate “in a manner” which suggested he was speaking for the Receiver. That contained within it a negative inference that he *could* communicate otherwise. For this reason, even though Havens made clear to the FCC that he was not speaking for the Receiver and was only speaking on behalf of himself and his non-Receivership Entity, the Superior Court found him in contempt anyway. The Superior Court

provided no guidance as to how Havens was to know that when he said he was *not* acting for the Receivership Entities, the FCC or someone else “might” reach the opposite conclusion.

Third, the underlying orders violate the First Amendment and the California Constitution by having Havens’ free speech rights turn on the listener’s perception of his speech instead of on his right to speak. Thus, the July 2016 Order prohibited Havens from speaking in a manner that might cause anyone to infer he was speaking for the Receiver. Therefore, Havens’ right to speak was made contingent on how a listener “might” hear it.

2. The Underlying Orders Are Void By Violating Havens’ Right To Petition For Redress Of Grievances.

The Contempt Order is additionally invalid because the Underlying Orders violate Havens’ fundamental right under the First Amendment and California Constitution (art. I, § 2, 3) to petition the FCC for redress of grievances. That right specifically applies to federal administrative agencies. The Underlying Orders’ entire purpose was to prevent Havens from personally contacting the FCC. Thus, when Havens contacted the FCC to advise that he thought the Receiver was acting contrary to the interests of his Entities, himself and the public, the Superior Court found this to be a contemptuous violation of its orders. This cannot stand.

3. The Receivership Order Is Void Insofar As It Prevented Havens From Filing A Federal Bankruptcy Against A Non-Receivership Entity.

The Contempt Order is independently void because the finding of Havens’ initiation of bankruptcy against the Leong Partnership – a non-Receivership Entity – interfered with Havens’ federally-protected right to file bankruptcy, and therefore violated the Supremacy Clause. U.S. Const. art. VI, cl. 2. The United States Supreme Court in *Donovan v. City of Dallas* (1964), 377 U.S. 408, held that a state may not hold persons in contempt for exercising their right to be in federal court, but this is what happened here. Directly applicable authority holds that

receivership orders may not prevent constituents of corporations and receiverships, such as creditors, to petition for bankruptcy.

4. The Receiver Failed To Show That Any Violations Were Willful.

In addition to failing the requirement of validity, the Contempt Order fails the requirement of willfulness. Here, the Receivership Order specifically contemplated that Havens might initiate a bankruptcy, which makes it unjustifiable to find that he acted in willful contempt when he did so. Moreover, with regard to his communication to the FCC, Havens made clear he was only communicating on his own behalf and on behalf of his non-Receivership Entity, Polaris. He made clear he was *not* acting for the Receiver. In light of this, there can be no finding that he willfully communicated in a way that suggested that he was acting for a Receivership Entity or the Receiver herself.

5. The Receiver Failed To Prove Havens Actually Violated The Underlying Orders.

Finally, the Contempt Order is void because the Receiver did not prove Havens violated the Underlying Orders beyond a reasonable doubt, as was her burden. She introduced no evidence to prove the Receivership Order forbade Havens from filing a bankruptcy against a non-Receivership Entity. To the contrary, the express language of the Receivership Order shows he could. Similarly, as to the FCC Communication, there was, at a minimum, an ambiguity as to whether Havens could communicate with the FCC if (as he did) he made clear to the FCC that he was not speaking on behalf of the Receiver.

For these and those reasons set forth in the accompanying memorandum, a petition for writ of habeas corpus, or other appropriate writ or relief, should issue.

PETITION

Petitioner Warren Havens (“Havens”), by his attorneys, Foley & Lardner, LLP, respectfully submits the following memorandum of points and authorities in support of his petition for a writ of habeas corpus or, in the alternative, certiorari or prohibition and for other appropriate relief.

I. INTRODUCTION

1. Petitioner Warren Havens is now threatened with imprisonment, having been found in contempt of court by the Superior Court of Alameda County (“Superior Court”). The contempt order (“Contempt Order” or “CO”)¹ finds that Havens acted in contempt for two reasons. *First*, it finds that Havens violated an order (the “Receivership Order”)² of the Superior Court dated November 16, 2015 imposing a receivership (the “Receivership”) on eight entities (the “Havens Companies”) which Havens founded, controlled and majority owns and which hold valuable wireless spectrum-based licenses (the “Licenses”), issued by the Federal Communications Commission (“FCC”), by filing a federal bankruptcy as to a non-receivership entity – the Leong Partnership (the “Leong Bankruptcy”). *Second*, it found that Havens violated both the original Receivership Order and a modification of that Order dated July 11, 2016 (the “July 2016 Order”)³ by communicating with the FCC in violation of an injunction.. Havens now seeks a writ of habeas corpus or other appropriate writ or relief because the Receivership Order and July 2016 Order are invalid and therefore the Contempt Order is void. A writ should therefore issue annulling the Contempt Order.

¹ The Contempt Order is attached hereto as Ex. 1.

² The Receivership Order is attached hereto as Ex. 2.

³ The July 2016 Order is attached hereto as Ex. 3.

2. *First*, the Contempt Order is invalid because it is unconstitutional on several independent grounds:

(a) The Contempt Order violates both the First Amendment to the United States Constitution, U.S. Const. Amend. 1, as well as the California Constitution, Cal. Const. Art. I, §2, because both the Receivership Order and the July 2016 Order were prior restraints on Havens’ free speech rights. The Contempt Order punishes Havens for communicating with the FCC in violation of the Receivership Order’s injunction against his “communicating with the FCC regarding the FCC Licenses or the Receivership Entities.”⁴ The July 2016 Order was further invalid because it restricted Havens’ speech based on how the listener might hear it, while free speech rights belong to the speaker.

(b) The Contempt Order violates Havens’ right to petition the FCC for a redress of his grievances, also protected by the First Amendment and the California Constitution. Yet, Havens now faces prison and heavy financial penalties for seeking redress from the FCC.

(c) The Contempt Order found that Havens interfered with the Receivership by filing the Leong Bankruptcy. No Receivership Entity was a debtor in that bankruptcy. Under the Supremacy Clause of the United States Constitution, Art. VI, § 2, a state court may not punish an individual for filing bankruptcy. In particular, a state court may not penalize or enjoin the filing of a federal bankruptcy against a non-receivership entity to protect a state receivership, yet that is what the Superior Court has done here.

⁴ Receivership Order, Ex. 2 at 5, ¶ 28(e)(9).

3. *Second*, the Contempt Order fails to satisfy a second essential element under California Code of Civil Procedure (“CCP”) §1209, as it punishes Havens even though he did not act willfully. The Receiver, as movant for an order of contempt, bore the burden of proving Havens’ contempt beyond a reasonable doubt. Yet the evidence not only does not meet that high standard as to the element of willfulness, it shows Havens did not act willfully.

4. Nor did Havens willfully violate the Receivership Order and July 2016 Order by communicating with the FCC. Havens testified that he reasonably believed that the July 2016 Order modified the Receivership Order and permitted him to communicate with the FCC, so long as it was not “in a manner” that suggested he was acting for the Receiver or the Receivership Entities. Accordingly, Havens specifically told the FCC he was not acting for the Receiver or the Receivership Entities. This clear disclaimer showed he was not trying to suggest he was acting for the Receiver or the Receivership Entities. Yet the Superior Court treated the disclaimer as actually evidencing willfulness when, in fact, it shows the opposite.

5. *Third*, the Receiver did not prove beyond a reasonable doubt that Havens actually violated the Receivership Order and July 2016 Order.

6. For these reasons and those detailed below, the Contempt Order cannot stand and therefore a writ should issue.

II. BACKGROUND

A. Havens Controlled And Managed Eight Entities Which Own Valuable FCC Licenses

7. The FCC issues private parties rights to operate wireless systems in various spectrum bands (the “FCC licenses”).

8. Beginning in 1999, Havens began forming a series of related companies that are involved in new forms of wireless services and technologies.⁵ These are the “Havens Companies” – eight entities Havens not only founded but controlled and at least majority-owned.⁶ The Havens Companies acquired from the FCC through auction an extensive portfolio of valuable wireless spectrum band licenses.⁷ Through great effort, Havens significantly improved the value of these Licenses through successful applications to the FCC for various benefits and through efforts to remove encumbrances.⁸

9. The Havens wireless Licenses have a common business plan, which involved certain forms of innovative nationwide wireless bands.⁹ These Licenses are primarily in two spectrum bands (200 MHz and 900 MHz). They are particularly valuable because they cover most of the Nation’s territory and population. Because they are not encumbered, they can be readily used or easily transferred. Since these two bands have longer-wave lengths, they offer more reliable coverage and lower cost of operations than do most commercial spectrum bands.

10. At the time of licensing in the 1990s-2000s, the Licenses had valuable applications ranging from transportation to location (including improvements for high precision GPS).¹⁰ Havens explained:

The nation’s need for “smart” or “intelligent” positioning, navigation and timing capabilities to service critical applications in

⁵ See Declaration of Warren C. Havens in Support of the Debtor’s Chapter 11 Petition and Request for First Day Orders in *In re Skybridge Spectrum Foundation*, No. 16-10626 (CSS), dated March 29, 2016; Receiver’s Exhibit 12 at Contempt Hearing (“Havens Delaware Declaration”), attached hereto as Ex. 4.

⁶ These entities are Environmental, LLC; Environmental-2, LLC; Intelligent Transportation & Monitoring Wireless LLC; Skybridge Spectrum Foundation (“Skybridge”); Telesaurus Holdings GB, LLC; VLG, LLC; Atlis Wireless LLC and Verde Systems. See Receivership Order, Ex. 2 at 7, Attachment 1, Tab 1.

⁷ *Id.*; Official Form 205-Involuntary Petition Against A Non-Individual filed in Leong Bankruptcy, attached as Ex. 8 to Notice of Ex Parte Motion And Motion For An Order To Show Cause Why Defendant Warren Havens Should Not Be Held In Contempt For Failure To Comply With Court Order dated August 27, 2016 (“Havens Leong Bankruptcy Declaration”), attached hereto as Ex. 5, at 7.

⁸ See Havens Delaware Declaration, Ex. 4 at 7, ¶ 16.

⁹ Havens Leong Bankruptcy Declaration, Ex. 5, at 7.

¹⁰ Havens Delaware Declaration, Ex. 4 at 3, ¶ 7.

transportation, energy systems, agriculture, natural resource industries, other critical service industries, and to monitor and protect the natural environment cannot be met without pPNT [positioning, navigation, timing and precision]. . . . **To the best of my knowledge, no other venture beside [the Havens Companies] has obtained the crucial foundation for these applications -- a nationwide licensed radio spectrum and related technology -- in the United States.**¹¹

11. Now, with the evolution and growing implementation of the “Internet of Things,” for which they may be particularly useful, their value is expected to grow exponentially. Havens believes the total value of Licenses is potentially in the many billions of dollars.

B. Leong Is A Minority Investor In Only Two Of Havens’ Eight Entities

12. Arnold Leong (“Leong”) is a minority lender/investor in only two of the eight Havens Companies – Telesaurus Holdings GB, LLC and Verde Systems – having contributed approximately \$1.1 million to these two entities in approximately 1999 or 2000. The agreements and other documents that Leong signed made clear that Havens retained the right to operate and control these entities. Nonetheless, by 2002, Leong proposed sales of the Licenses held by these entities to immediately monetize his investment. This was inconsistent with Havens’ longer-term nationwide strategy to improve and use the Licenses, a plan he had disclosed to Leong before Leong ever invested.

13. Since at least 2002, the parties have been in a dispute. That year, Leong filed a lawsuit in the Superior Court. In that lawsuit, Leong asserted that he and Havens had an oral partnership under which Leong claims he was given a non-dilutable 50% equity and voting control rights which encompassed all of the Havens companies.¹² At various times, other

¹¹ *Id.* at ¶ 8 (emphasis added).

¹² Havens Leong Bankruptcy Declaration, Ex. 5 at 7, ¶ 13; *see also* Transcript of Hearing dated September 27, 2016, attached as Ex. 6 at 16.

persons have also alleged in court actions a putative partnership with Leong and Havens giving them certain purported control rights in the Havens Companies.

14. Havens continues to believe and at all times has maintained, including in Court arguments, FCC filings, and otherwise, that Leong has no right whatsoever as to any Havens Companies other than a limited interest in Telesaurus Holdings VB and Verde LLC and that any such interest was obtained by fraudulent inducement and is unenforceable.

15. In 2005, the Superior Court ordered the parties to arbitrate (the “Arbitration”) and Leong’s lawsuit was placed on hold. While the Arbitration was initiated, it has not concluded despite pending for more than 10 years. Eventually, the matter was assigned to Hon. Frank Roesch.

C. A Receiver Is Appointed, Who Seizes Control Over All Of The Havens’ Companies’ Licenses

16. On November 16, 2015, while the arbitration was pending, Leong sought the appointment of a receiver. Havens strongly objected. Over that objection, the Superior Court entered the Receivership Order, appointing Susan Uecker as Receiver for all of the Havens’ Companies, including their Licenses, and for any Licenses held by Havens individually.¹³

17. As originally entered, the Receivership Order, *inter alia*, restrained Havens from communicating with the FCC regarding the Licenses or the Receivership Entities. The Receivership Order prohibits Havens, *inter alia*, from:

6. Interfering in any way with the assignment of the FCC Licenses (as defined in Attachment 1) to the Receiver.
7. Interfering in any way with the substitution of the Receiver as the individual responsible for the management of the FCC Licenses and Receivership Entities.

¹³ Havens Leong Bankruptcy Declaration, Ex. 4 at 8.

8. Commencing, prosecuting, continuing to enforce, or enforcing any suit or proceeding in the name of the Receivership Entities (as defined in Attachment 1), or otherwise acting on behalf of the Receivership Entities.

9. *Communication with the FCC regarding the FCC Licenses or the Receivership Entities.*¹⁴

18. The Receivership Order specifically anticipated that Havens as a “Defendant” might file a bankruptcy case during its pendency. Paragraph 24 of the Receivership Order states:

24. Bankruptcy – Plaintiffs duty to give notice. If a defendant files a bankruptcy case during the receivership, plaintiff shall give notice of the bankruptcy case to the court, to all parties, and to the receiver by the closing of the next business day after the day on which plaintiff receives notice of the bankruptcy filing.¹⁵

The Receivership Order further specified what the Receiver’s duties would be in the event of such a bankruptcy.¹⁶

D. The Superior Court Orders Havens And Leong To Keep Arbitrating And Allows Havens To Advocate For The Receivership Entities Therein

19. On November 24, 2015, the Superior Court compelled Havens and Leong to continue arbitrating despite the onset of the Receivership.¹⁷

20. On January 26, 2016, the Superior Court entered its Second Order Amending Receivership Order which specifically authorized Havens to act for the Havens Companies (then, the Receivership Entities) in the Arbitration and assert “any claims or defenses on behalf of the Receivership Entities and/or himself in the Arbitration, including those already pending in the Arbitration.”¹⁸ That Order specifically proscribed the Receiver from advocating any position on the merits of the dispute in the Arbitration.¹⁹

¹⁴ Receivership Order, Ex. 2 at 4, ¶ 28(e) (emphasis added).

¹⁵ *Id.* at 4, ¶ 24.

¹⁶ *Id.* at 4, ¶ 25.

¹⁷ The Order to Compel Arbitration is attached hereto as Ex. 7.

¹⁸ The Second Order Amending Receivership Order is attached hereto as Ex. 8.

¹⁹ *Id.* at 2.

E. The Superior Court Acknowledges The Risk Of A Prior Restraint And Tries To Modify Its Order

21. Importantly, after he entered the Receivership Order, Judge Roesch acknowledged that its original terms imposed a prior restraint upon Havens' freedom of speech, and therefore sought to modify the Order. As Judge Roesch stated at the hearing on June 30, 2016:

The prior restraint of speech is the problem for me. I think it's unconstitutional . . . I'm going to make – clarify that Order and I'm going to order that Mr. Havens is to not communicate with the FCC or to anybody else in a manner that might lead the recipient of the communication to infer that the communication from Mr. Havens may be on behalf of any receivership entity.²⁰

F. The July 2016 Order Continues To Impose A Prior Restraint On Havens' Communication With The FCC

22. On July 11, 2016, the Superior Court issued its modified order. Despite Judge Roesch's stated concerns about a prior restraint, the Court continued to restrain Havens from communicating with the FCC. The July 2016 Order required that if Havens wanted something said to the FCC he had to ask the Receiver to do so or, if she refused, move the Superior Court for an order requiring her to do so. Even if the Court granted that Motion, it would be the Receiver who would speak to the FCC, not Havens. It specifically provided:

- (1) Defendant Warren Havens is not to communicate with Federal Communications Commission or to any person or entity in a manner that might lead to the recipient of the communication to infer that the communication from Mr. Havens may be on behalf of any Receivership Entity.
- (2) The Court reiterates that it is the Receiver's responsibility to communicate on behalf of the Receivership Entities.
- (3) If Mr. Havens believes that it would be appropriate for any Receivership Entity to make a particular communication with the FCC, he may propose such communication to the Receiver. If the

²⁰ Transcript dated June 30, 2016, attached hereto as Ex. 9, at 6:10-25.

Receiver declines to make the communication in the manner requested, Mr. Havens may bring a motion to instruct the Receiver with regard to that proposed communication or other action.

(4) Mr. Havens is not prohibited from making Freedom of Information Requests in his own name and at his own expense. Mr. Havens is prohibited from making filings in FCC Docket Nos. 11-71 and 13-85 without prior court approval, with the exception of filings related to the personal sanctions against him and his appeal of those sanctions.

(5) With the preceding clarifications, the Receivership Order remains in effect.²¹

G. The Receiver Jeopardizes The Value And Existence Of The Havens Companies' Licenses

23. Havens believes that, since her appointment, the Receiver has acted in a manner that jeopardizes the value and continued existence of the Havens Companies and their FCC Licenses, common nationwide business plan and other interests. For instance, the Receiver proposed License-sale deals for Licenses that significantly undervalued what she was trying to sell, and sold quantities of radio spectrum (in the Licenses) that put major “holes” in the nationwide wireless coverage it took two decades to achieve and which is unique and needed for the common nationwide plan. One example that Havens’ counsel, Todd Norris, offered to the Superior Court in the hearings on the Motion for an Order to Show Cause of the harm posed to Havens and the Haves Companies by the Receivers’ approach was the proposed “PSC Transaction” where he noted even Leong’s expert valued one subset of the Licenses at between \$67 million and \$1.8 billion, while the Receiver had proposed to sell it *for \$1.2 million* – possibly \$1.8 billion below value. The Receiver eventually withdrew this proposed License-sale.²² As a second example, Havens’ counsel advised the Superior Court that the Receiver had negotiated contracts whose terms, if finalized, would have put the Havens Companies at risk for

²¹ July 2016 Order, Ex. 3 at 2; CO, Ex. 1 at 3, ¶ 6.

²² See 9/27/16 Tr., Ex. 6 at 26-27.

false representations and did not give Havens notice of those contracts or an opportunity to review them before she moved the Superior Court to approve them.²³

H. Havens Initiates A Bankruptcy Against A Non-Receivership Entity

24. On August 22, 2016, Havens, *pro se*, filed a petition for involuntary bankruptcy against the Leong Partnership as debtor in the United States Bankruptcy Court for the Northern District of California, signing the Petition on behalf of himself, Skybridge, and a non-Receivership entity of his called Polaris PNT PBC (“Polaris”) as creditors of the Leong Partnership.²⁴ The Involuntary Petition alleges that the Leong Partnership owed the creditors salaries, expenses and property taken by torts. It listed Leong’s personal address as the debtor’s address and it identified the FCC Licenses as principal assets of the partnership. It specifically noted that these assets were under the control of Susan Uecker as Receiver.²⁵ Havens provided the Receiver with notice of this Petition.²⁶

25. Havens filed an additional statement (the “Havens Leong Bankruptcy Declaration”) in support of the Involuntary Petition on August 24, 2016.²⁷ In the Havens Leong Bankruptcy Declaration, Havens explained that he filed the Chapter 11 petition:

*to meet an urgent need for protection of the eight FCC-licenses pPNT Companies . . . , of nationwide scope and importance, over which the Leong Partnership has de facto and other control and various pPNT Companies’ causes of action in legal proceedings in which the Leong Partnership also has de facto and other control.*²⁸

²³ *Id.*

²⁴ Involuntary Petition for Bankruptcy (“Involuntary Petition”), attached hereto as Ex. 10; CO, Ex. 1 at 3-4, ¶ 7.

²⁵ Involuntary Petition, Ex. 10, at 1.

²⁶ *Id.* at 8.

²⁷ Havens Leong Bankruptcy Declaration, Ex. 5; CO, Ex. 1 at 3-4, ¶ 7.

²⁸ Havens Leong Bankruptcy Declaration, Ex. 5 at 3, ¶ 4.

Havens noted that he was specifically seeking to protect the public interest under which the Havens' entities' licenses were issued.²⁹ Havens noted that he sought "an efficient and effective reorganization of the pPNT companies for their High public interest purposes . . . including . . . by a potential 'global settlement' with the FCC and parties before the FCC on matters largely caused and complicated by the Leong Partnership."³⁰

26. In Haven's initial statement in the Leong Bankruptcy in support of the Petition, Havens noted the Receiver and her appointment and also indicated that Leong had "commenced commercial relations" with her approximately one-half year before her appointment, as shown in FCC public records and receivership fee statements records.³¹

I. The Receiver, *Ex Parte*, Moves For An Order Of Contempt

27. On August 27, 2016, the Receiver filed an ex parte motion for an order to show cause re contempt based on Havens' filing of the Leong Bankruptcy Petition (the "First Show Cause Motion").³² On August 29, 2016, the Superior Court, per Judge Roesch, issued an Order to Show Cause why the filing of the Petition was not in contempt.³³ The Motion contended that the bankruptcy filing against the Leong Partnership "is interfering with the receivership by

²⁹ *Id.* at 3-4.

³⁰ *Id.* at 4.

³¹ *Id.* at 8.

³² First Show Cause Motion attached hereto as Ex. 13; CO, Ex. 1 at 4, ¶ 8. On March 29, 2016, Havens had filed a bankruptcy on behalf of one of the Havens Companies – Skybridge Spectrum Foundation – in the United States Bankruptcy Court for the District of Delaware (the "Skybridge Bankruptcy Court"). The Receiver participated in that bankruptcy for months and did not move for contempt of court during this time. Leong moved to dismiss the Bankruptcy, contending that, under the Receivership Order, Havens did not have authority to cause Skybridge to file for bankruptcy as a debtor. The Skybridge Bankruptcy Court agreed with Leong and, on July 11, 2016, ruled that the Receivership Order did not give Havens authority to initiate this bankruptcy on Skybridge's behalf and thus dismissing the case on that basis. Havens moved for reconsideration, which the Bankruptcy Court denied, but, in doing so, the Bankruptcy Court explained that Havens could assign his interests to another entity which could initiate such a bankruptcy. The Bankruptcy Court also emphasized that no receivership order could restrain a corporation from filing a bankruptcy because "it would be void as a matter of public policy regarding the constitutional ability and right to exercise access to the bankruptcy system." (Transcript of Proceedings, *In re Skybridge Spectrum Foundation*, No. 16-10626 (CSS) dated July 11, 2016, attached hereto as Ex. 12, at 47-48). The Bankruptcy Court's dismissal of the Skybridge Bankruptcy Case is currently on appeal.

³³ Order to Show Cause attached hereto as Ex. 13; CO, Ex. 1 at 4, ¶ 8.

attempting to place the assets of the receivership estate under the jurisdiction of the Bankruptcy Court, in violation of the [Superior] Court’s Order of November 16, 2015.”³⁴

28. In her Memorandum of Points and Authorities in Support of that Motion, the Receiver noted: “[i]t would be difficult to think of any more direct interference in the Receiver’s affairs than to try to put the Receivership Entities into bankruptcy.”³⁵

29. Even before the Receiver filed her First Show Cause Motion, Havens had dismissed the Involuntary Bankruptcy Petition as to Skybridge, which is a Receivership Entity, on August 25, 2016 – three days after the Petition was filed – before any substantive action was taken in the Bankruptcy.³⁶

J. Havens Communicates With The FCC

30. On September 2, 2016, Havens submitted for himself and his company Polaris – a non-Receivership Entity – a *pro se* filing to the FCC (the “FCC Communication”) petitioning in support of an extension of a certain “construction deadlines” for certain “LMS” 900 MHz wireless spectrum licenses held nationwide by Skybridge Spectrum Foundation – a non-profit entity which is one of the Receivership Entities – and petitioned for the same as to one License of Telesaurus Holdings GB LLC – another Havens Company/Receivership Entity – for one urban area.³⁷

31. Havens specifically noted in the FCC Communication that the Superior Court “has prohibited Havens from making any communication on behalf of the licensees in receivership” and made clear in his opening paragraphs that “[t]he Filing is **not** on behalf of

³⁴ First Show Cause Motion, Ex. 11, at 1.

³⁵ *Id.* at 6. Of course, none of these entities are actually named as Debtors or parties in the bankruptcy. The Bankruptcy was instead directed at an asserted partnership which purports to own interests in the Havens Companies and their Licenses.

³⁶ CO, Ex. 1 at 3-4, ¶ 7.

³⁷ FCC Communication, attached hereto as Ex. 14; CO, Ex. 1 at 4, ¶ 9.

Receiver Susan Uecker or the licenses in receivership.”³⁸ Havens explained that he believed he was in compliance with the Court’s restrictions because he made the filing for himself and his company Polaris, a non-Receivership Entity.³⁹ Havens advised the FCC that he had reached out to the Receiver to discuss the subject of his FCC Communication.

32. Havens noted specifically that he made his communication to the FCC “under protected federal rights, including First Amendment speech and petition rights and Fifth Amendment property and due process rights.”⁴⁰

K. The Receiver Seeks An Additional Contempt Finding Based On The FCC Communication

33. On September 14, 2016, the Receiver filed an ex parte motion for an order to show cause re contempt regarding Havens’ submission of the FCC Communication (the “Second Show Cause Motion”).⁴¹ In that Motion, the Receiver acknowledged that “[i]t is conceivable that Havens believed that the Court’s July 11, 2016 Order modified the Court’s Receivership Order.”⁴² On September 20, 2016, the Superior Court, per Judge Roesch, issued an Order to Show Cause why the FCC Filing was not in contempt.⁴³

L. The Superior Court Holds Havens In Contempt And Threatens Imprisonment

34. Because the Receiver’s motions sought a finding of indirect contempt, they were assigned to a judge other than Judge Roesch – Hon. Robert Freedman. Judge Freedman held trial on November 30, December 7 and December 14, 2016. The Receiver testified that the Leong Bankruptcy affected her “dealing with buyers,” stating “it’s difficult to sell any asset

³⁸ FCC Communication, Ex. 14 at 1 (emphasis in original).

³⁹ *Id.* at 1-2; CO, Ex. 1 at 7, ¶ 19.

⁴⁰ FCC Communication, Ex. 14 at 3.

⁴¹ Attached hereto as Ex. 15.

⁴² Second Show Cause Motion, Ex. 15 at 5.

⁴³ Order to Show Cause attached hereto as Ex. 16; CO, Ex. 1 at 4, ¶ 10.

when there is a pending bankruptcy case. It causes doubts and issues for buyers” and that buyers then wanted “protections based potentially on the bankruptcy filing.”⁴⁴

35. Havens additionally testified at the Contempt Hearing. He stated that he believed the Receivership Order permitted a bankruptcy filing.⁴⁵ He testified that he believed, if it were interpreted to prohibit him from filing a bankruptcy, it would have been unconstitutional.⁴⁶

36. Havens also testified that he filed the Leong Bankruptcy as a defense against counterclaims that the Havens Companies have against Leong “that are at issue to and are central to the arbitration.”⁴⁷ He testified that he believed that, under the Arbitration Agreement he had with Leong and under the Superior Court’s Order noted above (which put Havens in control of the Havens Companies/Receivership Entities in the Arbitration and barred the Receiver) that he was permitted to pursue such relief in the Leong Bankruptcy.⁴⁸

37. With regard to the FCC Communication, Havens testified that his attorneys told him they thought the filing would be permissible because it was not on behalf of the Receiver.⁴⁹ He testified he interpreted the July 2016 Order to guide *how* he could speak to the FCC but not to prohibit him from doing so.⁵⁰

38. The Receiver put on no witness to contest that these were Havens’ true and sincere beliefs.

39. After this, Judge Freedman found that Havens was in contempt both for initiating the Leong Partnership Bankruptcy and for communicating with the FCC.

⁴⁴ Transcript of Contempt Hearing dated November 30, 2016, attached hereto as Ex. 17, at 51-53.

⁴⁵ *Id.* at 59.

⁴⁶ *Id.* at 87-88.

⁴⁷ *Id.* at 95.

⁴⁸ *Id.* at 95-96.

⁴⁹ *Id.* at 119-20.

⁵⁰ *Id.* at 121-23.

1. The Superior Court Finds Havens In Contempt For Filing The Bankruptcy Against the Leong Partnership

40. The Superior Court found that Havens' filing of the Leong Bankruptcy Petition violated the Receivership Order by interfering with the Receiver's discharge of her duties, even after Havens dismissed Skybridge as a Petitioner.⁵¹ While the Involuntary Petition was directed at Leong and the Partnership he asserted as to ownership of the Licenses, the Superior Court found that the Leong Bankruptcy was an indirect effort to ultimately seek bankruptcy protection as to the Receivership Entities. After hearing the evidence, the Superior Court stated:

The Petition refers to "pPNT Companies under *de facto* control of the Debtor" (*Id.* at 2), even though they are under the Receiver's control. The Petition also states that the property of the Leong Partnership is "FCC licenses nationwide, locus Delaware, under Leong Partnership *de facto* control, via Susan L. Uecker, Receiver." A further statement filed by Havens makes clear that he seeks to put the Receivership Entities into bankruptcy. He asserts that there are 8 "pPNT Companies" that need bankruptcy protection. Those companies are defined by a list that is the very same list as the list of Receivership Entities.⁵²

41. Based on that premise, the Superior Court found that "[t]rying to put the Receivership Entities into bankruptcy and to attempt to impose a stay over the Receivership's assets amount to interference with the Receiver's duties."⁵³ The Superior Court credited the Receiver's testimony that Havens' Involuntary Petition had caused the Receivership to incur costs and divert the Receiver's and her counsel's attention from other matters, and complicated pending and future sales⁵⁴ transactions authorized by the Court."⁵⁵

⁵¹ CO, Ex. 1 at 4-5, ¶ 11.

⁵² *Id.* (internal exhibit citations omitted).

⁵³ *Id.* at 5, ¶ 12.

⁵⁴ The Court's finding that it would authorize future sales transactions which had yet to take place and had yet to be presented to it and that these would be complicated would seem speculative.

⁵⁵ CO, Ex. 1 at 5, ¶ 13.

42. Finally, the Court found that by originally filing the Petition on behalf of Skybridge (which he dismissed three days later), Havens violated the July 2016 Order, which directed that he was “not to communicate with the Federal Communications Commission or to any other person or entity in a manner that might lead to the recipient of the communication to infer that the communication from Mr. Havens may be on behalf of any receivership entity.”⁵⁶

2. The Superior Court Finds Havens In Contempt For Communicating With The FCC

43. Separately, the Superior Court found that Havens acted in contempt of the July 2016 Order by communicating with the FCC. The Superior Court noted the “Receivership Order enjoined Havens from ‘[c]ommunicating with the FCC regarding the FCC Licenses or the Receivership Entities.’”⁵⁷

44. The Superior Court explained that the July 2016 Order did not permit Havens to communicate with the FCC on behalf of himself or a new entity he created, Polaris. It stated:

Nothing in [Paragraph 1 of the July 2016 Order] suggests that the Receivership Order was changed to allow Havens to communicate about the Licenses or the Receivership Entities, so long as such communications were for himself or an entity not under the Receiver’s control.⁵⁸

45. The Superior Court rejected the contention that the July 2016 Order permitted Havens to communicate with the FCC even if such communications were for himself or for an entity not under the Receiver’s control. The Superior Court noted that the July 2016 Order “did not modify the prohibition on Havens’ communicating with the FCC regarding the Licenses or the entities.”⁵⁹ The Superior Court emphasized that it “specifically identified the sole path by

⁵⁶ *Id.* at 5, ¶ 14.

⁵⁷ *Id.* at 6, ¶ 18.

⁵⁸ *Id.* at 7, ¶ 21.

⁵⁹ *Id.* at 7, ¶ 19.

which Havens could propose a communication to the FCC on the licenses or entities. It took care to state, ‘With the preceding clarifications, the Receivership Order remains in effect.’”⁶⁰

46. The Superior Court found that Havens’ statement to the FCC that he believed he was acting consistent with the Court’s Receivership Order “indicates to this Court that he knew he was violating the Court’s Order and was pre-emptively defending another contempt charge.”⁶¹

3. The Superior Court Sentences Havens To Jail And Fines Him

47. As penalty, the Court “imposed the following punishment: a fine of \$2,000, payable to the Court *and* a sentence of 10 days in the Alameda County Jail, subject to the stay provisions, below.”⁶² The Court also awarded fees and costs to the Receiver in the amount of \$57,110.00 for its finding of contempt.⁶³

48. The Superior Court stayed execution of the incarceration portion of the sentence to permit Havens to withdraw the Bankruptcy Petition unconditionally for himself and Polaris and to pay the cost award to the Receiver (the “Stay”).⁶⁴ The Superior Court stated specifically that the Stay would incidentally accommodate Havens request to seek appellate review of the Contempt Order.⁶⁵

49. On December 21, 2016, the parties stipulated to extend further hearings on the Contempt Order and the Stay until the date of the next hearing on the Contempt Proceedings,

⁶⁰ *Id.* at 7, ¶ 20 (quoting July 2016 Order, Ex. 3 at 2, ¶5).

⁶¹ *Id.* at 9, ¶ 27. The Court also noted that Havens had previously been admonished in 2015 by an FCC Administrative Law Judge for his behavior in a hearing on an adversary licensee. However, while the FCC has threatened to impose penalties against Havens, it never has done so.

⁶² *Id.* at 10, ¶ 31 (emphasis added). Because the Court found Havens to have violated two orders, it doubled the fine and term of imprisonment available under Code of Civil Procedure § 1218(a). (*Id.* at 10, ¶ 30).

⁶³ *Id.* at 10, ¶ 32.

⁶⁴ *Id.* at 10-11, ¶ 33.

⁶⁵ *Id.* at 10, ¶ 33, n.3.

February 1, 2017 at 9:30 a.m.⁶⁶ On January 3, 2017, the Superior Court entered that the Stipulation as its Order.⁶⁷

M. Havens Dismisses The Leong Partnership Bankruptcy, But The Bankruptcy Court Thereafter Grants Dismissal On Summary Judgment

50. On December 19, 2016, because of the Contempt Order, Havens filed a notice of voluntary dismissal of the Leong Bankruptcy without prejudice.⁶⁸

51. Havens has not paid the Receiver the \$57,110 ordered in the Contempt Order.

52. On January 25, 2017, the Receiver filed her Mitigation Statement, asserting that the Superior Court gave Havens an opportunity to mitigate his contempt by withdrawing the Leong Bankruptcy petition and paying the Receiver's fees.⁶⁹ However, Havens believes the Contempt Order is at least ambiguous as to whether he can avoid jail by doing so. The express language appears to suggest that imprisonment is an additional and not an alternative penalty. In any event, Havens believes that the Contempt Order is void and therefore that any ordered penalty is also null and void.

N. The Superior Court Acknowledges That It "Is Not A Great Thing" That The Receiver Runs Havens' Businesses

53. On January 10, 2017, the parties came before the Court for a hearing on the Receiver's proposed sale of large portion of some of the FCC Licenses to Avista Corporation, an electric power utility. Havens' counsel noted that the record did not show why the transaction should take place, that it was unclear how the price was chosen that there was not even a

⁶⁶ Stipulation attached hereto as Ex. 18.

⁶⁷ Order attached hereto as Ex. 19.

⁶⁸ See Receiver's Statement Regarding Mitigation of Contempt by Defendant Warren Havens' ("Receiver Mitigation Statement"), attached hereto as Ex. 20, at 2. In the Leong Bankruptcy, on December 29, 2016, the Bankruptcy Court granted Leong's Motion of Summary Judgment to dismiss the bankruptcy on the ground that a bona fide dispute existed as to the existence of the Leong Partnership. (Receiver Mitigation Statement, Ex. 20 at 22-37). Havens appealed that ruling. (*Id.* at 39-40).

⁶⁹ *Id.* at 2.

representation that it was for fair market value and that it was, in fact, multiples below fair market value.⁷⁰

54. Havens counsel first explained that the sale would weaken the nationwide plan and wireless coverage for all of the Havens Companies'/Receivership Entities' Licenses that provide the majority of value. (*Id.* at 5). As he stated:

[T]hose licenses were not purchased so that they could just be sold for a profit. There is a nationwide plan that the entities were trying to implement when the receivership took place and that completely derailed the whole thing.⁷¹

55. Havens' counsel asked for an evidentiary hearing. The Court responded that Havens "should start looking on the wall and seeing the words there that suggest that maybe this receivership is going to stay in place until the whole case is resolved at arbitration"⁷²

56. He noted that the Receiver's limitations:

Mr. DeGroot and his client are not the best people in the world to be making determinations for this business because they have to play it on the safe side. They cannot be entrepreneurs in the traditional definition where they're committed to take a lot of risk.⁷³

He added:

But the receivership is an albatross around the neck of Mr. Leong and it's around the neck of Mr. Havens. And until they figure that out Mr. DeGroot's client is going to continue to run the business, which is not a great thing.⁷⁴

⁷⁰ Transcript dated Jan. 10, 2017, attached hereto as Ex. 21, at 4-5.

⁷¹ *Id.* at 8.

⁷² *Id.* at 9.

⁷³ *Id.* at 10.

⁷⁴ *Id.* at 11-12.

O. The Superior Court Permits Havens To Make A Limited Communication To The FCC, But Does Not Address The Contempt Order

57. Having found Havens in contempt of court for communicating with the FCC in December, 2016, the Superior Court agreed with Havens several weeks later that it was appropriate for him to make certain personal communications to the FCC.

58. On January 13, 2017, the Superior Court entered an Order specifying that Havens could file a petition with the FCC for reconsideration of the FCC Order in No. 16-172 in his own name.⁷⁵ The recognition that Havens has this right would seem to be inconsistent with his finding of contempt for his earlier personal communication. Nonetheless, the Contempt Order remains intact and enforceable.

P. The Superior Court Rejected Havens' Request For A Stay Pending Determination Of The Writ

59. On January 27, 2017, Havens, through counsel, Foley & Lardner LLP, requested that the Receiver agree to extend the stay through the time Havens' Petition is finally decided. While the Receiver had previously agreed to a stay to let the writ be filed, the Receiver would not agree to one to allow it to be decided.⁷⁶

60. Havens presented an *ex parte* motion for a stay to the Superior Court on January 30, 2017.⁷⁷ Havens advised the Court that he believed he was likely to succeed because of the constitutional violations at issue and his lack of willfulness; that because of the threat of imprisonment he faced irreparable injury for which there was no adequate remedy at law; that the Receiver would suffer no prejudice from a stay; and that the public interest favored a stay.

⁷⁵ See Order on *Ex Parte* Application of Defendant Warren Havens to Instruct Receiver dated January 13, 2017, attached hereto as Ex. 22.

⁷⁶ See email exchange between D. Goroff, counsel for Havens, and D. DeGroot, counsel for the Receiver dated January 27, 2017, attached hereto as Ex. 27.

⁷⁷ Havens' *Ex Parte* Application for Stay of Contempt Order Pending Interlocutory Review is attached hereto as Ex. 24. The supporting declaration is attached hereto as Ex. 25. The Proposed Order is attached hereto as Ex. 26

Nonetheless, the Superior Court denied a stay. The Superior Court stated that had Havens paid the fines in December upon entry of the Contempt Order it would have considered a stay. But since he had not, it would not. The Court further stated that it would respect a stay issued by the Court of Appeal. Finally, the Court stated that Havens must appear on Wednesday, February 1, 2017 at 9:30 a.m. and that if this Court does not stay the incarceration portion of the Contempt Order, and Havens is not present at that time, it would issue a bench warrant for his arrest.

PRAYER

Wherefore, Petitioner prays that this Court:

1. Issue a stay of all proceedings in the trial court pending the outcome of this interlocutory appeal;
2. Issue a writ of habeas corpus or, in the alternative, certiorari or prohibition and vacate and annul the Contempt Order and any penalty associated therewith; and
3. Grant other and further relief as this Court may deem just and proper.

Dated: January 31, 2017

Respectfully submitted,

/S/ EILEEN R. RIDLEY

Eileen R. Ridley
Alan R. Ouellette
FOLEY & LARDNER LLP
555 California Street, Suite 1700
San Francisco, CA 94104
Telephone: (415) 434-4484
Facsimile: (415) 434-4507

David B. Goroff (*pro hac vice pending*)
FOLEY & LARDNER LLP
321 N. Clark Street, Suite 2800
Chicago, IL 60654
Telephone: (312) 832-4500
Facsimile: (312) 832-4700

Attorneys for Petitioner Warren Havens

VERIFICATION

I am an attorney licensed to practice law in the State of California and counsel of record for Petitioner. I have read the Petition for Writ of Habeas Corpus or, in the Alternative, Certiorari or Prohibition and for Other Appropriate Relief and know its contents. The facts referred to in this petition are true based on my personal knowledge from my review of the pleadings, briefs, and other documents filed in the Alameda County Superior Court. I make this verification as Petitioner's counsel because I am familiar with the relevant facts. If called and sworn as a witness, I could and would competently testify to these facts. The other facts set forth in the Petition have citations to competent and admissible evidence contained in the concurrently filed writ exhibits.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 31st day of January, 2017, in San Francisco, California.

By: /S/ EILEEN R. RIDLEY
Eileen R. Ridley

STANDARD OF REVIEW

This Court reviews questions of constitutional law *de novo*. *Taylor v. Dep't of Industrial Relations, Division of Labor Standards Enforcement*, (2016) 4 Cal.App.5th 801, 807 [41 Cal. Rptr. 3d 861]. This Court reviews facts relevant to First Amendment analysis *de novo*, independent of the trial court's findings. *See Evans v. Evans*, (2008) 162 Cal.App.4th 1157, 1166 [76 Cal. Rptr. 3d 859]. Thus, when analyzing the right to free speech under either the United States Constitution or the California Constitution, appellate courts must “make an independent examination of the entire record to determine the constitutionality of the trial court's order.” *Hurvitz v. Hoefflin*, (2000) 84 Cal.App.4th 1232, 1242 [101 Cal. Rptr. 2d 558] (applying independent review implicating “prior restraint”). Similarly, this Court reviews issues of federal preemption *de novo*. *See CPF Agency Corp. v. Sevel's 24 Hour Towing Service*, (2005) 132 Cal.App.4th 1034, 1043 [34 Cal. Rptr. 3d 120] (applying *de novo* standard of review to preemption analysis under the Supremacy Clause).

A contempt judgment under California Code of Civil Procedure § 1209 is reviewed under the substantial evidence standard. *Mitchell v. Superior Court*, (1989) 49 Cal.3d 1230, 1256 [265 Cal. Rptr. 144]; *In re M.R.*, (2013) 220 Cal.App.4th 49, 58 [162 Cal. Rptr. 3d 709]. The evidence, findings, and judgment are “all to be strictly construed in favor of the accused, and no intendments or presumptions can be indulged in aid of their sufficiency.” *Mitchell*, 49 Cal.3d at 1256; *In re M.R.*, 220 Cal.App.4th at 58.

MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

A. A Writ Is Proper Here

Where, as here, a petitioner is incarcerated or threatened with incarceration, review of a Contempt Order properly lies by writ of habeas corpus. *See In re Buckley* (1973) 10 Cal.3d 237, 240 [110 Cal.Rptr. 121, 122, 514 P.2d 1201].

In addition, even where a contemnor is not threatened with incarceration, review of a contempt order may be had by petition for certiorari. *See e.g., Miller v. Municipal Court of Los Angeles Judicial Dist., Los Angeles County* (1967) 249 Cal.App.2d 531, 532 [57 Cal.Rptr. 578, 578].

Further, where a petitioner is not threatened by incarceration, a writ of prohibition may issue to challenge the contempt order as invalid. *See In re Koehler* (2010) 181 Cal.App.4th 1153, 1165 [104 Cal.Rptr.3d 877, 886–887] (attorney’s writ of habeas corpus challenging 5-day jail sentence for contempt treated as writ of prohibition where attorney was not incarcerated).

A request for any of these methods for review “in the alternative” is permissible. *Fine v. Superior Court (DeFlores)* (2002) 97 Cal.App.4th 651, 661 [119 Cal. Rptr. 2d 376]; *Davidson v. Superior Court* 70 Cal.App.4th 514, 522 (1999) [82 Cal.Rptr.2d 739, 743–44].

The Superior Court found authority for its Contempt Order in § 1209(a)(5).⁷⁸ This provides that one may be found in Contempt of Court where there is: (5) Disobedience of any *lawful* judgment, order or process of the Court.” (*Ibid.*) (emphasis added).

As the Superior Court recognized, this requires a movant to prove each of four elements: (1) there is a valid order, (2) a party has actual knowledge of the order; (3) the party has the

⁷⁸ CO, Ex. 1 at 2, ¶ 1.

ability to comply with the order; and (4) the party has willfully disobeyed the order.⁷⁹ The movant bears the burden and must provide each element beyond a reasonable doubt.⁸⁰

A void order cannot be the basis for a valid contempt judgment. *Moore v. Kaufman* (2010) 189 Cal.App.4th 604, 616 [117 Cal.Rptr.3d 196]; *Oksner v. Superior Court In and For Los Angeles County* (1964) 229 Cal.App.2d 672 [40 Cal.Rptr. 621] (the law is well settled to the effect that refusal to obey a void order of court is not a contempt and cannot be punished as such).

Here, irrespective of which form of writ is considered, it is clear that the Contempt Order is invalid. The underlying orders which are alleged to have been violated are unconstitutional under both the United States and California Constitutions. First, the Receivership Order violated the Supremacy Clause insofar as it restrains Havens' ability to file a bankruptcy against the Leong Partnership. Second, the Receivership Order and the July 2016 Order violated the First Amendment to the United States Constitution and the California Constitution by infringing on Havens' rights of free speech and to petition his government for the redress of grievances.

Indeed, California Courts view the California Constitution's "free speech provisions as more protective, definite and inclusive of rights to expression of speech than their federal counterparts." *Lopez v. Tulare Joint Union High School Dist.* (1995) 34 Cal.App.4th 1302, 1327 [40 Cal.Rptr.2d 762], *as modified* (June 6, 1995); *San Diego Unified Port Dist. v. U.S. Citizens Patrol* (1998) 63 Cal.App.4th 964, 970 [74 Cal.Rptr.2d 364].

⁷⁹ *Id.* (quoting *Conn v. Superior Court* (1987) 196 Cal.App.3d 774, 784 [242 Cal.Rptr. 148]).

⁸⁰ *Id.*; 9/27/16 Tr., Ex. 6 at 39.

B. By Restricting Whether And How Havens Could Communicate With The FCC, The Receivership Order And July 2016 Order Are Invalid Prior Restraints Which Violate The First Amendment And California Constitution

In his famous dissent in *Walker v. City of Birmingham* (1967) 388 U.S. 307, Justice Brennan noted that:

Constitutional restrictions against abridgments of First Amendment freedoms limit judicial equally with legislative and executive power. Convictions for contempt of court orders which invalidly abridge First Amendment freedoms must be condemned equally with convictions for violation of statutes which do the same thing.

Id. at 349.

1. The Receivership Order And July 2016 Order Are Unlawful Prior Restraints.

A “prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity.” *Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 419 (quotation marks omitted). Indeed prior restraints are “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart* (1976) 427 U.S. 539, 559. Thus, “prior restraints on free speech under the First Amendment are subject to the highest level of scrutiny.” *Berndt v. California Dept. of Corrections* (N.D. Cal., Aug. 9, 2004, No. C03-3174 TEH) 2004 WL 1774227. The California Constitution also prohibits prior unlawful restraints. *See Miller v. Superior Court* (1999) 21 Cal.4th 883 [89 Cal.Rptr.2d 834, 986 P.2d 170].

“When a prior restraint takes the form of a court-issued injunction, the risk of infringing on speech protected under the First Amendment increases.” *Metropolitan Opera Ass’n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Intern. Union* (2d Cir. 2001) 239 F.3d 172, 176. As the U.S. Supreme Court held in *Nebraska Press Ass’n*, “[i]f it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, [a] prior restraint ‘freezes’ it

at least for the time.” *Nebraska Press Ass'n, supra*, 427 U.S. at p. 559. In general, prior restraints are only warranted where there is a “clear and present danger.” *Nebraska Press Ass'n, supra*, 427 U.S. at p. 563. Here, of course, no such danger exists and the Superior Court found none.

Here, the Receivership Order and July 2016 Order plainly imposed an unlawful prior restraint on Havens. The Superior Court made clear it had issued an injunction against Havens speaking (including petitioning). It reiterated that this injunction was not modified by the July 2016 Order and that under no circumstance was Havens to talk directly to the FCC.⁸¹

Moreover, while the July 2016 Order⁸² allowed Havens to ask the Receiver to make certain representations to the FCC, Judge Freedman held that that Order continued to fully prohibit him from speaking to the FCC directly.⁸³ It stated that Havens is “is not to communicate with the [FCC] or to any other person or entity in a manner that might lead to the recipient of the communication to infer that the communication from Mr. Havens may be on behalf of any Receivership Entity.” The plain language of the Order restricted Havens from communicating not just with the FCC, his and his Companies’ Regulator – which itself was a violation – but with “any other person or entity” in a way any person *might* construe as being on behalf of the Receivership Entities.” No standards were set forth as to how Mr. Havens was supposed to make that determination. There certainly was no “clear and present danger” which justified this prior restraint – and the Court found none. The restriction could only chill and restrict protected free speech.

⁸¹ CO, Ex. 1 at 4-7, ¶¶ 11-21.

⁸² The July 2016 Order also allowed Havens to submit Freedom of Information Act requests to the FCC, but it did not allow him to communicate information to the FCC.

⁸³ Again, *after* it found Havens to be in contempt, the Court made an exception to this blanket prohibition. But the harm threatened by its earlier prior restraint remains.

Moreover, the modification made in the July 2016 Order gave the Receiver a veto over any ability of Havens to communicate information in any manner to the FCC. And since Havens' communication detailed his worries about her competence and conduct, there was no realistic possibility she would have agreed to make such representations about herself to the FCC.

Further, if she refused, the July 2016 Order required Havens to pursue a laborious appeal process and move the Superior Court to order her to speak. This would have been costly and time-consuming and would have improperly allowed the Superior Court to examine the content of his desired communication. Moreover, even if the Court granted Havens' motion, the Receiver – not Havens – would then still have control over what was communicated. This requirement plainly thwarted any time-sensitive or urgent communications.

2. The Underlying Orders Are Unconstitutionally Vague

In order to establish a case for contempt, the underlying order must be clear, specific, and unequivocal. *In re Marcus* (2006) 138 Cal.App.4th 1009 [41 Cal.Rptr.3d 861]; *Wilson v. Superior Court* (1987) 194 Cal.App.3d 1259, 1273 [240 Cal.Rptr. 131]. The terms of the order must be specific and narrowly drawn and any ambiguity in the order must be resolved in favor of the alleged contemnor. *In re Marcus, supra*, 138 Cal.App.4th at p. 1014; *In re Blaze* (1969) 271 Cal.App.2d 210, 212 [76 Cal.Rptr. 551].

Here, the underlying orders are additionally infirm under the First Amendment and California Constitution because they were unconstitutionally vague. *See Coates v. City of Cincinnati* (1971) 402 U.S. 611, 612–14 (finding ordinance prohibiting “conduct...annoying to persons passing by” was impermissibly vague); *In re Berry* 68 Cal.2d 137 (1968) [65 Cal.Rptr. 273, 436 P.2d 273] (contempt order was unconstitutionally overbroad in that it improperly restricted the exercise of First Amendment freedoms and was too vague to satisfy the

requirements of notice and fair trial required by the Due Process Clause of the Fourteenth Amendment). As to the FCC Communication, Havens told the FCC that he was not the Receiver and was only speaking on behalf of himself personally and his non-Receivership Entity and yet the Receiver moved for contempt and the Court entered a finding of this anyway. The Superior Court found that the language in the July 2016 order that said Havens could not communicate “in a manner” that could be inferred he was acting for the Receiver did not change the Receivership Order’s prohibition on Havens making any communications whatsoever. But if all communications were prohibited, then there would have been no need to add a restriction on the “manner” in which Havens could communicate. The reference that he could not communicate “in a manner” that suggested he was acting on behalf of a receivership entity is coined with the negative inference that he *could* communicate “in a manner” that did not so represent. At the very least, it injects an ambiguity that makes the Order invalid as a basis for contempt.

Separately, as to the Court’s finding that the Leong Bankruptcy filing was an act of contempt, the Receivership Order expressly anticipated that there may be a bankruptcy filing, (included a page enumerating what the Receiver was to do if a defendant did so) the Superior Court punished Havens and sentenced him to imprisonment for bringing a bankruptcy – not against the Havens Companies’ themselves – but against the partnership that Leong alleges exists which asserts purported ownership rights in these Entities.

Moreover, the Superior Court ordered continued arbitration desired for the arbitration to decide whether Leong has an ownership interest in the Havens’ Companies, giving Havens sole authority to advocate the Receivership Entities’ position in that regard and proscribing the Receiver from advocating on this issue. In addition, the Arbitration Agreement governing that arbitration allowed Havens to seek equitable relief. These would appear to permit the filing of a

bankruptcy regarding Leong's asserted interests. Since the issue of Leong's ownership interests was not an issue within her Receivership authority. Thus, it is hard to see how a bankruptcy directed at Leong's ownership interests was an infringement of the Receivership Order.⁸⁴ There appears no meaningful distinction between an arbitration adjudicating ownership interests *vel non* or a Bankruptcy Judge doing so, yet the Superior Court lauded one while finding the other to be a basis for a contempt finding.

3. **The Underlying Orders Violate The First Amendment And California Constitution By Having Free Speech Rights Turn On The Listener's Perception**

Third, the Receivership Order and July 2016 Order restricted Havens' speech (and ultimately led to him being punished) based on how others might possibly perceive his speech. Yet, the Supreme Court and other Courts have long held that free speech cannot be conditioned on how others might perceive it, even if they might be offended by it. Thus, in *Metropolitan Opera*, the Court struck down an injunction which "broadly prohibit[ed] the Union from making any statement that might, after it has been made, be construed as defamatory or even 'harassing'." The Court found that this improperly restricted speech "that may ultimately, after full appellate review, be found constitutionally protected." *Metropolitan Opera Ass'n, Inc.*, *supra*, 239 F.3d at 176. The so-called "Heckler's Veto" cases also show that a speaker's free speech rights should not turn on how one perceives speech. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134; *San Diego Unified Port Dist. v. U.S. Citizens Patrol* (1998) 63 Cal.App.4th 964 [74 Cal.Rptr.2d 364] (California recognizes Heckler's Veto doctrine).

Importantly, nowhere did the Superior Court explain how Havens was to determine how listeners would "infer" what he said. For instance, here, the Superior Court provided no

⁸⁴ Indeed, the Court stated that concluding the Arbitration was a way to end the Receivership. (1/10/17 Tr., Ex. 21 at 9).

guidance as to how Havens was to know that when he said he was *not* acting for the Receivership Entities, the FCC might reach the opposite conclusion. Indeed, there was no evidence in the record that the FCC or anyone else actually perceived Havens' communication as having been made on behalf of a Receivership entity. Despite the necessity of proving a violation beyond a reasonable doubt and the fact that she bore the burden, the Receiver submitted absolutely no proof of this critical fact.

C. **The Contempt Order Is Invalid Because The Receivership Order And July 2016 Order Violate Havens' Right Under The First Amendment And California Constitution To Petition The FCC For Redress Of Grievances**

Under both the First Amendment to the United States Constitution and the Cal. Const., Art. I, § 2, 3), the right to petition for redress of grievances is fundamental. *See Smith v. Silvey* (1983) 149 Cal.App.3d 400 [197 Cal.Rptr. 15]. This right to petition has repeatedly been found to apply to administrative agencies, including federal agencies. *California Motor Transport Co. v. Trucking Unlimited* (1972) 404 U.S. 508, 510. Here, as the enforcement of the Receivership Order and the July 2016 Order shows, the entire purpose of these orders were to prohibit Havens from personally contacting the FCC. Thus, when he contacted the FCC directly, even though he made it specifically and absolutely clear both that he was speaking only for himself and his non-Receivership entity and that a Receiver existed, the Court still found this to be a contemptuous violation of its earlier Orders.

Yet, Havens had every right to file and pursue the subject FCC communication because he believed that unique and extraordinarily valuable Licenses were being mishandled by the Receiver in a way that is contrary to not only to his rights through his entities as owner of

Licenses, but also the public's interest in the best way to use these Licenses, market them and maximize their value.⁸⁵

D. The Receivership Order Violates The Supremacy Clause Insofar As It Restricted Havens' Filing Of A Bankruptcy For A Non-Receivership Entity

The Contempt Order was independently invalid because the finding that Havens' initiation of bankruptcy against a non-Receivership Entity – the Leong Partnership – interfered with Havens' federally protected right to file bankruptcy and therefore violated the Supremacy Clause. U.S. Const., Art. VI, cl. 2.

In *Donovan v. City of Dallas* (1964) 377 U.S. 408, the U.S. Supreme Court held that a state may not hold persons in contempt for exercising their right to be in federal court. As the Supreme Court explained:

Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they presented, and to appeal to the Court of Appeals from the District Court's dismissal. They have been punished both for prosecuting their federal-court case and for appealing it. They dismissed their appeal because of threats to punish them more if they did not do so. The legal effect of such a coerced dismissal on their appeal is not now before us, but the propriety of a state court's punishment of a federal-court litigant for pursuing his right to federal-court remedies is. That right was granted by Congress and cannot be taken away by the State. The Texas courts were without power to take away this federal right by contempt proceedings or otherwise.

Id. at 413-14. Yet that is exactly what the Superior Court did here.

Havens did not file a bankruptcy against any Receivership Entity. Indeed, Havens, as an owner and creditor and a non-Receivership Entity that he operates, sought bankruptcy against a non-Receivership Entity – the Leong Partnership.⁸⁶ The Superior Court seized upon the fact that

⁸⁵ Indeed, a state order that addresses what a party may do before the FCC may be infirm on the additional ground that it encroaches on the FCC's jurisdiction. *See Radio Station WOW v. Johnson* (1945) 326 U.S. 120, 130-31.

⁸⁶ Initially, Havens included Skybridge as a petitioner but immediately dropped this.

Havens was seeking this Bankruptcy because he hoped it would provide a mechanism for eventually asserting control over the Receiver, but that does not make his filing unlawful.

Courts have repeatedly held that a state court may not enjoin the filing of a petition of bankruptcy in federal court. *See, e.g., Thompson v. Samson United Corp.* 203 Misc. 48 [113 N.Y.S.2d 607] (N.Y. Sup. Ct. 1952); *Jordan v. Independent Energy Corp.* 446 F.Supp. 516 (N.D. Tex. 1978); *International Shoe Co. v. Pinkus* 278 U.S. 261 (1929) (federal law occupies the field of bankruptcy regulation and state law that conflicts with that occupation is invalid).

This is true even as to an entity that is in a state court receivership. *See In re Corporate and Leisure* (Bankr. D. Ariz. 2006) 351 B.R. 724 (finding that state court receivership orders cannot bar exclusive bankruptcy court jurisdiction); *In re Kreisers, Inc.* (Bankr. D.S.D. 1990) 112 B.R. 996 (corporation's officers and directors could pass resolution to file bankruptcy despite state court order in receivership proceeding not to do so); *Matter of Greater Atlanta Apartment Hunter's Guide, Inc.* (Bankr. N.D. Ga. 1984) 40 B.R. 29 (state court receivership cannot operate to deny corporate debtor access to Nation's federal bankruptcy courts).

While the Receiver argued to the Superior Court that *S.E.C. v. Byers* (2d Cir. 2010) 609 F.3d 87 permitted the Superior Court to enjoin a federal bankruptcy to support a receivership,⁸⁷ that was inaccurate. *Byers* concerned a *federal* receivership overseen by the SEC. It, thus, did not present any question of the Supremacy Clause. Moreover, the Second Circuit emphasized the narrow exception found there to the general rule favoring the resolution of creditor's claims through the bankruptcy process. The *Byers* decision turned on the special expertise entrusted to the SEC to resolve issues emanating from complicated Ponzi schemes. There is no equivalent here.

⁸⁷ *See* Haven's *Ex Parte* Application for Stay of Contempt Order, Ex. 24 at 13.

E. The Contempt Order Is Void Because Havens Did Not Willfully Violate The Receivership Order Or The July 2016 Order.

As discussed above, with regard to the Bankruptcy filing, Havens took pains not to file it directly against any Receivership Entity. He specifically noted there was a Receiver and served the Receiver. It was an attempt to protect his ownership interests against Leong's challenges to these interests in the Arbitration. While, if Havens succeeded in the Leong Bankruptcy, that may have given him a basis to end the dispute with Long that led to the Receivership (and therefore a way to end the Receivership), Havens did not ask for such relief in the Petition and otherwise did nothing improper. Indeed, the Receivership Order specifically contemplated Havens might initiate a bankruptcy, which makes it unjustifiable to find he acted in willful contempt when he did so.

Moreover, with regard to his communications to the FCC, Havens made clear that he was only communicating for himself and his Non-Receivership Entity, Polaris. He made clear he was *not* acting for the Receiver. In light of this, there can be no finding that he willfully communicated in a way that suggested he was acting for a Receivership Entity or the Receiver herself, and the Superior Court cited no such evidence. The Receiver admitted that Havens may have believed the July 2016 Order gave him the right to communicate with the FCC. As noted above, the ambiguity in the July 2016 Order made it reasonable for him to assume he *could* communicate with the FCC so long as he did not suggest he was acting for the Receivership Entities. This is particularly true because Havens believed it would be an unlawful prior restraint (as it is) for the Court to construe the Receivership Order and July 2016 Order to bar him outright from communicating with the FCC.

F. The Contempt Order Is Void Because The Receiver Did Not Prove Havens' Violations Of The Underlying Orders Beyond A Reasonable Doubt

As noted above, it was the Receiver's burden to prove beyond a reasonable doubt each element of CCP 1209. She failed to do so, even assuming that the Receivership Order and July 2016 Order were each valid (and neither was).

First, the Receiver introduced no evidence to prove that the Receivership Order forbade Havens from filing a bankruptcy of any kind. The language of the Receivership Order assumes the opposite – that a “defendant” may file a bankruptcy, and that is to be expected, since it complies with federal supremacy.⁸⁸ It also assumes in such a circumstance that the Receiver may be put to expense, as it authorizes her to retain bankruptcy counsel “to assist the Receiver with issues arising out of the bankruptcy proceedings that affect the Receivership.”⁸⁹

The Receiver *did not* seek an order to show cause for a violation of the Receivership Order in March 2016 when Havens filed the bankruptcy petition for Skybridge, a receivership entity. This further demonstrates she had no cause to suddenly cry contempt when Havens, as a creditor, sought to protect his rights in that capacity months later *against Leong*, which is not a receivership entity. This alone provides reasonable doubt as to whether Havens believes he was willfully violating the Receivership Order by filing the Leong bankruptcy.

Similarly, as to the FCC Communication, there is, at a minimum, an ambiguity as to whether Havens could communicate with the FCC so long as he made clear that the FCC did not believe he was acting for the Receiver. Havens did so, and the Receiver submitted no proof to suggest the FCC was confused.

Thus, the Receiver's failure to meet her heavy burden is an additional ground for the writ.

⁸⁸ Receivership Order, Ex. 2, at 4, ¶ 26.

⁸⁹ *Id.* at 4, ¶ 25(d).

G. This Court Should Enter A Stay Pending Disposition Of The Petition

The Superior Court refused to grant a temporary stay to permit Havens to seek interlocutory review despite the clear mandate from the California Supreme Court to the contrary in *New York Times Co. v. Superior Court* (1990) 51 Cal.3d 453, 460 [273 Cal.Rptr. 98, 796 P.2d 811]. Havens faces imminent imprisonment and therefore this Court should issue an immediate stay to allow the merits of his Petition to be decided.

CONCLUSION

For the foregoing reasons, this Court should grant the Petitioner's petition for a writ and vacate and annul the Contempt Order and any penalty associated with it.

Dated: January 31, 2017

Respectfully submitted,

/S/ EILEEN R. RIDLEY

Eileen R. Ridley
Alan R. Ouellette
FOLEY & LARDNER LLP
555 California Street, Suite 1700
San Francisco, CA 94104
Telephone: (415) 434-4484
Facsimile: (415) 434-4507

David B. Goroff (*pro hac vice pending*)
FOLEY & LARDNER LLP
321 N. Clark Street, Suite 2800
Chicago, IL 60654
Telephone: (312) 832-4500
Facsimile: (312) 832-4700

Attorneys for Petitioner Warren Havens

CERTIFICATE OF COMPLIANCE

I certify that, under California Rules of Court, rules 8.204(c) and 8.486(a)(6), the Petition for Writ of Habeas Corpus or, in the Alternative, Certiorari or Prohibition and for Other Appropriate Relief contains 13,556 words.

Dated: January 31, 2017

/S/ EILEEN R. RIDLEY

Eileen R. Ridley
Attorneys for Petitioner Warren Havens

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to this action; my current business address is 555 California Street, Suite 1700, San Francisco, CA 94104-1520.

On January 31, 2017, I caused to be served by personal service the foregoing document(s) described as **PETITIONER WARREN HAVENS' PETITION FOR WRIT OF HABEAS CORPUS OR, IN THE ALTERNATIVE, CERTIORARI OR PROHIBITION AND FOR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; AND REQUEST FOR IMMEDIATE STAY OF PROCEEDINGS PENDING INTERLOCUTORY REVIEW** on the interested parties in this action as follows:

Sheppard, Mullin, Richter & Hampton LLP
Geraldine A. Freeman
David A. DeGroot
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111
Facsimile: 415.434.3947
Email: gfreeman@sheppardmullin.com
ddegroot@sheppardmullin.com

Bullivant Houser Bailer PC
Andrew B. Downs
C. Todd Norris
235 Pine Street, Suite 1500
San Francisco, CA 94104
Facsimile: 415.352.2701
Email: andy.downs@bullivant.com
todd.norris@bullivant.com

Bertrand, Fox, Elliot, Osman & Wenzel
Richard W. Osman
2749 Hyde Street
San Francisco, CA 94109
Facsimile: 415.353.0990
Email: rosman@bfesf.com

Hon. Robert B. Freedman
Superior Court of California
County of Alameda
Department 20
Administration Building (4th Floor)
1221 Oak Street
Oakland, CA 94612

Shopoff Cavallo & Kirsch LLP
Paul F. Kirsch
James M. Robinson
601 Montgomery Street, Suite 1110
San Francisco, CA 94111
Facsimile: 415.984.1978
Email: paul@scklegal.com
james@scklegal.com

X BY HAND DELIVERY.

X Executed on January 31, 2017 at San Francisco, **California.**

X I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ EILEEN R. RIDLEY
Eileen R. Ridley